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No. 93-1543

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CHRISTINE MCKENNON,
Petitioner,
v.
NASHVILLE BANNER PUBLISHING CO.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 84 national and international unions with a total membership of approximately 13,500,000 working men and women, files this brief *amicus curiae* with the consent of the parties, as provided for in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Ms. McKennon, the plaintiff in this case, has alleged in her complaint that, due to her age, she was disadvantaged in pay, was harassed, and, ultimately, was discharged. Since the employer was granted summary judgment, and the plaintiff denied all relief, for the present purposes the posture of the case is one in which it must be taken as true that all of these wrongs, violative of the

Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, occurred. *Eastman Kodak v. Image Technical Services, Inc.*, 112 S. Ct. 2072, 2077 (1992).

Before she was fired (but after some of the wage discrimination and harassment occurred), Ms. McKennon took home copies of certain confidential documents, a violation of her employment responsibilities that came to light only as a result of the discovery in this case. The employer maintains, based *solely* on declarations by employer officials, that had the confidentiality breach been discovered when it occurred, Ms. McKennon would have been discharged at that time rather than at the later time she was, in fact, discharged.[1] On that basis alone, the employer was absolved of all responsibility for all its alleged unlawful actions.

I. It is, we submit, all but self-evident that the Court of Appeals erred in absolving completely an employer who has committed several different acts in direct violation of Congress' proscription against visiting disadvantages upon employees because of their age. On any construction of the facts, it is apparent *both* that the employer violated the norms established by the statute *and* that the violation was the cause, as a matter of actual fact, of Ms. McKennon's discharge. Whatever the validity of the conclusion that Ms. McKennon would have been discharged earlier had her employer known of her confidentiality breach, the *actuality* is that her employer did *not* know, and that she *was* harassed, *was* disadvantaged in pay, and *was* discharged *because of her age*. The ADEA was therefore in terms violated.

[1] While the employer purported to "fire" Ms. McKennon a second time, after the evidence of her infraction came to light, that second, *post hoc* firing was not the basis for Court of Appeals ruling. Had it been, the Court of Appeals then would have simply limited relief to the period before the second firing, which is not what it did.

We note that while the record reflects that Ms. McKennon recognized that her actions were ones for which she could have been discharged, she did *not* concede that she in fact would have been discharged, quite a different issue. *See* p. 15, *infra*.

Moreover, Ms. McKennon was injured as a result of that violation—that is, the employer's illegal actions caused Ms. McKennon financial (and possibly other) harm. And, this Court has made clear that even imperfect employees who commit serious employment-related misdeeds are entitled to the protection of the employment discrimination laws. Thus, both the larger public policy goals of the ADEA and the statute's compensatory, "make whole" purpose are served by holding the employer liable for its wrongs and by requiring the employer to provide at least some recompense to Ms. McKennon for the ADEA violations the employer did commit.

II. The more interesting, and difficult, questions raised by cases such as this are two: First, what are the precise *remedial* consequences, if any, of the fact that the plaintiff employee did something at any point, known or unknown to the employer, that could have legitimately justified the adverse employment action in fact taken by the employer against the employee for a proscribed reason? Second, assuming that in some such circumstances relief is properly limited on such a ground, what standards of proof apply and what types of evidence suffice?

As to the first question, tort analogies, principles governing determination of damages, and considerations of statutory policies all lead to the conclusion that the possibility of a hypothetical discharge (or failure to hire or other adverse employment action) distinct from the one that actually occurred should be allowed to affect only backpay relief under the ADEA, and only when there is evidence sufficiently strong to make the likelihood of the hypothetical employer action all but certain. In most circumstances, that evidence would have to establish *both* that the employee infraction would have come to light absent the discriminatory action and the ensuing lawsuit (and when), and that the employer would have discharged the employee when the information came to light.

As to the second question, the testimony of an employer witness as to what would have happened in hypothetical circumstances that did not in fact occur is ordinarily inadmissible under the Federal Rules of Evidence, as non-expert opinion or speculation not within the witness' personal knowledge and should not, for similar reasons, be sufficient to meet the employer's standard of proof even if admitted.

Finally, the reinstatement remedy should be subject to somewhat different considerations from the backpay remedy. There may be very narrow circumstances in which employees should not be reinstated even if the back pay remedy is appropriate. Conversely, since reinstatement is an equitable remedy, and since wrongdoers are not necessarily entitled to the free exercise of the same prerogatives as non-wrongdoers, there may be situations in which an employer would in fact not have kept the individual on, but in which the person should still be reinstated in the interest of eliminating discrimination in the workplace.

ARGUMENT

I. AN EMPLOYER WHO COMMITS VIOLATIONS OF THE ADEA IS NOT IMMUNIZED FROM LIABILITY BY REASON OF THE PLAINTIFF'S BREACH OF AN EMPLOYMENT RULE THAT WAS NOT KNOWN TO THE EMPLOYER AT THE TIME OF THE ADEA VIOLATIONS.

1. As always, the starting place for determining how a statute applies to the situation before the Court is the statutory language itself. *Reves v. Ernst & Young*, 113 S.Ct. 1163, 1169 (1993); *United States v. Alvarez-Sanchez*, 114 S.Ct. 1599, 1603 (1994).[2]

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[2] The substantive provisions of the Age Discrimination in Employment Act "were derived *in haec verba* from Title VII [of the 1964 Civil Rights Act]." *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). Generally, judicial interpretations of the substantive provisions of Title VII "appl[y] with equal force in the context of age discrimination." *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985).

The procedural provisions of the ADEA are, however, "something of a hybrid" (*Lorillard*, 434 U.S. at 578), drawing in part upon the procedural scheme of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, but also emulating portions of the remedial scheme of Title VII. *See* 29 U.S.C. § 626(b), (c), & (d); *compare* 42 U.S.C. § 2000e-5. In particular, with regard to the relief provided by the ADEA, "legal or equitable relief as may be appropriate to effectuate the purposes of this subchapter" is generally available (29 U.S.C. § 626(b), (c)), while under Title VII, equitable relief and, under the 1991 amendments, limited compensatory and punitive damages, are available (*compare* 42 U.S.C. § 2000e-5(g), 42 U.S.C. 1981a(b)). And, the availability of back pay relief under the ADEA is a matter of right, while under Title VII back pay is a matter of equitable discretion. *Lorillard*, 434 U.S. at 584, *citing Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

For present purposes, the upshot is that substantive Title VII cases are generally pertinent in interpreting the ADEA (and are freely cited for that purpose in this Brief). Title VII cases concerning the availability of injunctive forms of equitable relief are generally applicable as well. This free interchange does not extend to the ADEA provisions concerning the availability of monetary relief, including back pay, which differ from those of Title VII.

The ADEA defines an "employee" as "an individual employed by any employer. . . .", and an "employer" as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 29 U.S.C. § 630 (b) and (f). And the statute, as here pertinent, proscribes "an employer" from

> "discharg[ing] any individual or otherwise discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." [29 U.S.C. § 623 (a)(1).]

This language, in our view, compels the conclusion that Ms. McKennon's age discrimination lawsuits is *not* subject to dismissal pursuant to summary judgment for the defendant. The Nashville Banner has not contended that

it is not an "employer" under the ADEA. Ms. McKennon has contended that she was at the relevant time an "employee" of the Banner within the ordinary meaning of the term, in the sense that she performed economically-useful work for the newspaper and was paid for so doing.[3] In any event, the pertinent statutory provision does not protect only "employees" but "individuals" from discharge and other adverse employment actions based upon age.[4]

Moreover, here, in contrast to the situation in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), there is no doubt that, on the facts as alleged and, for present purposes, not disputed, the substantive prohibition of

[3] *See, e.g.*, Webster's New Ninth Collegiate Dictionary (1991) at 408 (defining "employ" as "to provide with a job that pays wages or salary" and "employee" as "one employed by another usually for wages or salary and in a position below the executive level").

Plainly, it is a functional definition of this sort, not a normative one, that is generally used in federal statutes. Absent some indication to the contrary, the term "employee" in those statutes ordinarily is interpreted as incorporating the common law standard, emphasizing " 'the hiring party's right to control the manner and means by which the product is accomplished.' " *Nationwide Mutual Ins. Co. v. Darden*, 112 S. Ct. 1344, 1348 (1992), *quoting Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989). The IRS, for example, in determining whether or not an employer is required to pay Social Security taxes on an employee, considers a series of factors concerning that person's actual relationship to the employer. See Rev. Rul. 87-41, 1987-1 Cum. Bull. 296, 298-99. It does not consider whether or not the employer had some basis, known or unknown, for altering that relationship which was not in fact exercised before the time period within which paid work was performed and taxes therefore are due. In short, the question whether or not a person *is* an employee is not for legal purposes generally confused with the question whether that person is *properly* an employee.

[4] Similarly, the statute's remedial provisions permit "[a]ny *person* aggrieved" to bring a civil action, and provide for payment as unpaid wages of "[a]mounts owing to a *person* as result of a violation of this chapter." 29 U.S.C. § 626(b) and (c)(1) (emphases supplied). The retaliatory discharge provision, 29 U.S.C. § 623(d), however, does limit its protections to "employees or applicants for employment."

the statute *applies in terms*. The pertinent question in *Price Waterhouse* was whether or not an adverse employment decision can be said to occur "because of" the individual's gender, where the employer's adverse employment decision took into account both permissible and impermissible factors and might have been the same absent the impermissible factor. The plurality, concurring, and dissenting opinions answered that question through varying theoretical constructs. But all these opinions ultimately concluded that a given employer action does not occur "because of" a proscribed motive where the *same* action would have occurred at the *same* time because of other, actually-existing motives. *Id.* at 258 (plurality opinion); 261 (White, J., concurring); 279 (O'Connor, J., concurring); 295 (Kennedy, J., dissenting).[5]

Here, however, there is no question that the actions complained of, according to the complaint, occurred "because of" Ms. McKennon's age, *both* in the sense that age "was a factor in the employment decision *at the moment it was made*" (*id.* at 240 (plurality opinion)), *and* in the "but-for causation" sense (*id.*, at 262 (O'Connor, J., concurring in the judgment)) that Ms. McKennon's age in fact did "make a difference to the outcome" so that "[t]he event would [not] have occurred *just the same* without it." (*id.* at 282 (Kennedy, J. dissenting) (emphasis supplied)). *See also id.* at 279 (emphasis supplied) (question is whether "the outcome would have been the *same* if respondent's professional merit had been [the employer's] only concern.")

At a minimum, absent the employer's age discrimination, Ms. McKennon would not have suffered the wage discrimination and harassment she alleges she endured while employed, and would have been discharged, if at

[5] The principal difference between the majority and dissenting opinions in *Price Waterhouse* was not on that question, but on whether or not the burden of proof as to what would have happened absent the impermissible consideration is properly on the plaintiff or on the defendant.

all, not when she was but some time later, when her infraction was discovered, losing less pay and benefits than she in fact lost. Thus, while Ms. McKennon might eventually have been terminated at some point had she not been discriminated against on the basis of her age, overall "the outcome would [not] have been the *same*." *Id.* at 279 (Kennedy, J., dissenting) (emphasis supplied).

Indeed, where the employer only acquires information concerning an alleged employee infraction *after* the employer takes an unlawful, adverse action against that employee—so that the employer could *not* have taken that action based upon that information at that time—the infraction could *not* have been a contributing factor ("motivating", "substantial", "but for" or otherwise) with regard to the *actual* employer action.[6] To take an analogous example, in a wrongful death action brought against the allegedly negligent driver of the automobile that hit and instantaneously killed the plaintiff, evidence that the autopsy determined that the plaintiff had been terminally ill (although not in any way affecting her ability to survive the impact) at the time of the accident, and therefore would have died a short while later, is *not*

[6] There is in the ADEA no provision parallel to the subsection of Title VII forbidding reinstatement and backpay where "such individual was . . . discharged for any reason other than discrimination on account of race [etc.] . . ." Title VII § 706(g), 42 U.S.C. § 2000e-5(g). Even under Title VII, the provision just quoted would plainly have no application here, since plaintiff was not discharged for a "reason other than discrimination on account of [age]"; she was (or we must assume that she was) discharged precisely for age. *See also Price Waterhouse*, 490 U.S. at 244 n.10 (§ 706(g), modelled upon § 10(c) of the National Labor Relations Act, 29 U.S.C. §160(c), concerns relief, not liability, and applies not to individual discrimination cases but to pattern-and-practice and class action cases); *NLRB v. Transportation Management*, 462 U.S. 393, 401 n.6 (1983) (construing § 10(c) of the NLRA so as not to apply where there was in fact a discriminatory motive); *ABF Freight System Inc. v. NLRB*, 114 S. Ct. 835, 839 (1994) (the NLRA's specific, limited prohibition upon reinstatement and backpay in certain circumstances indicates that there is no such prohibition in other circumstances).

relevant to the issue of whether the driver has caused the death or committed a tort. Drivers do not have a privilege to negligently run down terminally ill pedestrians any more than drivers have a right to negligently run down apparently healthy pedestrians. The illness pertinence, at the most, is in measuring the monetary damages payable on account of the plaintiff's death. *See* William L. Prosser, *Handbook of the Law of Torts* § 52 at p. 321 (4th ed. 1971).[7]

2. Despite the plain applicability of the state's prohibitory language, as construed by this Court, and the absence of any pertinent exceptions to that operative statutory language, the employer maintains that there is some implicit basis, not apparent upon the face of the statute, upon which Ms. McKennon's suit should be dismissed and all relief for the ADEA wrongs committed denied out of hand.

(a) The first suggestion as to why this result obtains is best characterized as the contention that, because at the time of the adverse employment actions against her (or at least some of them) Ms. McKennon had committed an employment infraction that might have justified her discharge, Ms. McKennon has forfeited any and all ADEA rights she might otherwise have as an "employee"

[7] It is important to distinguish between the concepts of causation and valuation. *See* Joseph H. King, Jr., Causation, Valuation and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences, 90 Yale L.J. 1353, 1353-58 (1981) (hereinafter "Causation, Valuation and Chance") (explaining the difference). In determining the cause of an injury, events that might have occurred but did not are irrelevant, even if they would have caused the same injury and even though, in placing a monetary value on the injury, consideration of such events may be proper. "[I]n determining causation, the question is not what would have happened but what did happen. A murdered man would have died in time if the blow had not been given; yet the murderer's blow is a cause of his death." Joseph H. Beale, The Proximate Consequences of an Act, 33 Harv. L. Rev. 632, 638 (1920); *see also* Prosser, *Handbook of the Law of Torts*, at p. 237 ("Causation is a fact. It is a measure of what in fact happened.").

or "individual." The protections of the employment discrimination laws, however, are *not* limited to employees who have never violated the employer's or society's rules.

It is perhaps sufficient that the ADEA's language provides no such limitation.[8] The employment discrimination statutes are directed at eradicating reliance on certain proscribed criteria in the employer's decisionmaking process concerning employees, thereby creating "equality of employment *opportunity*." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971) (emphasis supplied). As "prophylactic" statutes (*Albemarle Paper Co.*, 422 U.S. at 417 (1975)) whose purpose is to "drive employers to focus on qualifications rather than on [age or other proscribed factors]" (*Price Waterhouse*, 490 U.S. at 243 (plurality opinion)), employment discrimination statutes do *not* permit employers to continue to act upon the proscribed criteria with regard to less-than-perfect employees whom the employer might have a basis for discharging for "cause."

The Court has made that much clear in two seminal decisions growing out of employment discrimination claims brought by employees who engaged in extremely serious employment-related misconduct, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).

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[8] The National Labor Relations Act, for example, does in limited circumstances regard otherwise-covered employees as outside the statute's protections because of actions deemed to be fundamentally inconsistent with the statutory scheme. *See* 29 U.S.C. § 158(d) ("Any employee who engages in a strike within any notice period specified in this subsection . . . shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.") The ADEA contains no similar exclusion of an employee from the Act's protections based on the actions of those employees. *See also* n.6, *supra*.

McDonnell Douglas involved an applicant for employment who, along with others, "illegally stalled their cars on the main roads leading to petitioner's plant for the purpose of blocking access to it at the time of the morning shift change," and was arrested and fined as a result. 411 U.S. at 794-95. The Court recognized that "[n]othing in Title VII compels an employer to absolve and rehire one who had engaged in such deliberate, unlawful activity against it." *Id.* at 803. Nonetheless, the plaintiff was not disqualified from pursuing his case further because he had committed a serious, indeed criminal, wrong, directly affecting the defendant employer. Rather, recognizing that the role of Title VII is broadly to eradicate race and other forms of prohibited employment discrimination, the Court held that an employer "may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, *but only if this criterion is applied alike to members of all races*." *Id.* at 804 (emphasis supplied).

McDonald, in its turn, concerned two employees discharged for "theft of property entrusted to [their] employer for carriage." 427 U.S. at 284.[9] Their contention was that an equally culpable employee was not discharged and "that the reason for the discrepancy in discipline was that the favored employee is Negro while petitioners are white." *Id.* at 282-83. This Court emphatically rejected the employer's argument that, because the employees had committed "a serious criminal offense" against their employer, "Title VII affords petitioners no protection in this case" (*id.* at 281):

> We cannot accept respondents' argument that the principles of *McDonnell Douglas* are inapplicable where the discharge was based, as petitioners' complaint admitted, on participation in serious misconduct or crime directed against the employer. The Act prohibits *all* racial discrimination in employ-

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[9] The Court in *McDonald* assumed that the misappropriation "would amount to a felony under Texas law." 427 U.S. at 283 n.12.

ment, without exception for any group of particular employees, and while crime or other misconduct may be a legitimate basis for discharge, it hardly is one for racial discrimination. [*Id.* at 283.]

In this instance Ms. McKennon is not contending that there was age discrimination in the application of the employer's rules against disclosure of confidential information, but that there was age discrimination *before* any question of the application of those rules arose. With regard to the question whether Title VII and the ADEA protect sinners as well as saints from proscribed discrimination, however, the distinction is one that makes no difference: Since "the Act prohibits *all* [age] discrimination in employment, without exception for any group of particular employees", *McDonald*, 427 U.S. at 283, Ms. McKennon's later-discovered confidentiality infraction does not strip her of her ADEA rights.[10]

(b) The second suggestion proffered for nonsuiting the plaintiff in this case despite the adverse employment actions taken against her based on age is that Ms. McKennon suffered no injury due to the employer's illegal actions, and therefore is entitled to no relief. *See*

[10] Some have suggested the equitable "clean hands" doctrine as a basis for denying relief to plaintiffs in the position of Ms. McKennon. That suggestion is doubly flawed. First, the "clean hands" doctrine, like other common law and equitable defenses, is not imported into statutory schemes where to do so would frustrate the purposes of the statute. *See, e.g., Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138 (1968); *Virginia Elec. & P. Co. v. Labor Board*, 319 U.S. 533 (1943); *A.C. Frost & Co. v. Couer D'Alene Mines Corp.*, 312 U.S. 38, 40 & 43-44 n.2 (1941); *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852 (9th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980). *McDonnell Douglas* and *McDonald* necessarily reject any "clean hands" approach, and make clear that to deprive a plaintiff of statutory rights under employment discrimination statutes because of their own workplace misconduct would fundamentally undermine the statutory scheme. Second, since backpay under the ADEA is *not* an equitable remedy (*see* n.2, *supra*), the "clean hands" doctrine would not in any event apply here on the backpay issue.

Pet. App. 5a. The notion is that if Ms. McKennon would have been fired for legitimate reasons, had the employer known of those reasons, before she was actually fired for age-related reasons, she suffered no injury due to the latter. *See Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 285-86 (1977) ("an employee [should not be] place[d] in a better position as a result of [age] than he would have occupied [otherwise]"); *Price Waterhouse*, 490 U.S. at 249 (plurality opinion). That theory does not fit the present circumstances, for two reasons.

First, as this Court has recently held, there is an "injury in fact" simply from being subjected to a discriminatory policy, even if the plaintiff cannot prove that he or she would have faired better under a nondiscriminatory policy. *Northeastern Florida Contractors v. Jacksonville*, 113 S.Ct. 2297 (1993) (contractors suffer a cognizable injury and therefore have standing to challenge minority preference program for city contracts without alleging or proving that absent the program, the plaintiff contractors would have been awarded any contracts); *Regents of the University of California v. Bakke*, 438 U.S. 265, 281 n.14 (1978) (applicant challenging minority admissions preference suffered an injury in being unable "to compete for all 100 places in the class, simply because of his race" and "[t]he question of [the applicant's] admission . . . is simply one of relief.)[11] *See also Price Waterhouse*,

[11] Justice Powell's controlling *Bakke* opinion went on to specifically reject the notion that the *Mt. Healthy* concern with avoiding windfalls to plaintiffs applies where it is clear that the discriminatory motive *was in fact the sole cause* of a plaintiff's injury:

> There is no occasion for remanding the case to permit petitioner to reconstruct what might have happened if it had been operating the type of program described as legitimate. . . In *Mt. Healthy*, there was considerable doubt whether protected First Amendment activity had been the "but for" cause of [the plaintiff's] protested discharge. Here, in contrast, there is no question as to the sole reason for respondent's rejection—purposeful racial discrimination in the form of the special admissions program. Having injured respondent solely

490 U.S. at 265 (O'Connor, J., concurring) ("Congress considered reliance on gender or race in making employment decisions an evil in itself . . . . Congress was not blind to the stigmatic harm which comes from being evaluated by reason of one's race or sex.")[12]

Indeed, the "primary" purpose of employment discrimination statutes is to "cause[] employers and unions to self-examine and self-evaluate their employment practices" (*Albemarle Paper Co.*, 422 U.S. at 418) so as to eliminate discriminatory behavior. It is therefore particularly plain that employers should *not* be absolved where the action taken was "because of" a statutorily proscribed criterion *and* the plaintiff suffered the precise sort of stigmatic harm the statute was designed to eliminate.[13]

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on the basis of an unlawful classification, petitioner cannot now hypothesize that it might have employed lawful means of achieving the same result . . . In sum, a remand would result in fictitious recasting of past conduct. [438 U.S. at 320 n. 54 (opinion of Powell, J.) (citations omitted).]

[12] Unlike Title VII, which at the time *Price Waterhouse* was decided provided only for equitable relief, the ADEA provides for "such legal or equitable relief as will effectuate the purpose of the chapter." *But see* Civil Rights Act of 1991 § 102, 42 U.S.C. § 1981a (providing for limited compensatory and punitive damages for Title VII disparate treatment cases); 42 U.S.C. § 2000e-2(m) and 2000e(5)(g)(2)(B) (limiting relief available where (unlike here) "the respondent would have taken the same action in the absence of the impermissible aggravating factor"). It would therefore appear, although this Court has not had the opportunity to address the question, that damages for the "stigmatic harm" of being subject to age discrimination are available under the ADEA, regardless whether there was economic injury as well. Since, as developed in the text, there was economic injury in this case, there is no need to decide this issue here.

[13] There may be limited circumstances in which it is both true that age discrimination was the dispositive cause in fact of an adverse employment action *and* the plaintiff is not thereby placed in a worse economic position than if the discrimination had not occurred. In particular, in hiring situations, it is possible that an individual could be excluded from the hiring pool solely on the basis of age, yet on the basis of his or her completed application and the em-

Second, even if one considers only the economic injury to the plaintiff, it is indubitably *not* true that Ms. McKennon, if denied all relief, would be "in no worse position than if [she had not been discriminated against on the basis of her age]." *Mt. Healthy School Dist.*, 429 U.S. at 285-86. As a result of age discrimination, Ms. McKennon, according to her complaint, lost wages, suffered emotional distress due to harassment, and was, at the very least, discharged before she would have been discharged for "cause." Indeed, it was only when she filed suit to redress her age discrimination injuries, that the information on her confidentiality breach came to light in the course of, and *as a result of*, the litigation itself. For all that appears, that information might never otherwise have been discovered, and it is only on the basis of that information that Ms. McKennon was "fired" for a second time and then nonsuited on her present ADEA claims.[14]

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ployer's regular practices for screening applicants it is perfectly clear that the individual would have been excluded in the next "cut" anyway, for example, for lacking the requisite pilot's license or a universal-required college degree. Because in the hiring situation the person is *not* employed while the consideration process goes on, there is no economic injury where the rejection would have occurred before final decisions were made, even if the rejection actually occurred earlier than it would have otherwise.

The situation just hypothesized is similar to the one addressed in *Bakke*, and is different from the situation addressed in *Price Watehouse*. In *Price Waterhouse*, the contention was that the *same actual decision* would have been made, at the *same time*, without regard to any discriminatory motive. Where that is the contention, the "cause" and "injury" issues collapse onto each other, so that the conclusion that there was no economic injury also demonstrates that illegitimate factors did not in fact cause the discharge. In contrast, in the above hiring example, there is no question that the cause of the events that actually occurred was unlawful discrimination, and the question is whether there is a cause of action without proof of a consequent economic injury.

[14] Without in any way condoning Ms. McKennon's actions in taking home confidential documents, we believe it is highly relevant that because she did not use the documents she took home to divulge information injurious to the Banner, it is unlikely that her actions

Thus, the theory of the decision below undermines the "prophylactic" values inhrent in ADEA, frustrates the "make . . . whole for injuries suffered on account of unlawful employment discrimination," (*Albemarle Paper Co.*, 422 U.S. at 418) value in the statute and compromises the very effort to vindicate those values through the legal process. That theory is plainly not a fair and proper interpretation and elaboration of the ADEA.

II. ONLY IN NARROW CIRCUMSTANCES SHOULD THE FACT THAT AN EMPLOYMENT DISCRIMINATION PLAINTIFF BREACHED AN EMPLOYMENT RULE THAT WAS NOT THE BASIS FOR HER UNLAWFUL DISCHARGE LIMIT THE RELIEF AVAILABLE FOR THE STATUTORY VIOLATION.

The question, then, becomes what relief ADEA plaintiffs in situations like this one are entitled to receive on proving that the defendant employer did commit the ADEA violations alleged.[15]

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would have been discovered absent the employer's discriminatory actions against her and the ensuing lawsuit. In contrast, employee wrongdoing that does injure the employer, such as the theft in *McDonald* is likely to come to light whether or not the employee make a claim against the employer eventually.

[15] With regard to damages for unequal pay because of age *while employed*, and for harassment because of age *while employed* there appears to be *no* basis for limiting the relief otherwise available under the ADEA. The lower pay and harassment, if both occurred as alleged, inflicted injuries while the plaintiff was still employed, and would not have been affected by any later hypothetical discharge based on legitimate, nondiscriminatory factors. Moreover, the values underlying the prohibitions upon age-related discriminatory pay and age-related harassment certainly would not permit the discrimination in question even if the employer *knew* of Ms. McKennon's breach of confidentiality while she was employed. An employer who discovered that breach would be entitled to discharge or otherwise discipline an employee for that reason, but not to pay her less because of her age and harass her because of her age.

As to liquidated damage under the ADEA, we would assume that the standards of "willfulness" under § 7(b) of the statute, 29 U.S.C. § 626(b), established by this Court would apply (*see Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1708 (1993)) as usual, and that the amount of liquidated damages would be, as usual, an amount equal to whatever backpay is awarded, as the statute unequivocally directs.

Although punitive damages are not available under the ADEA, as a general matter it would appear that since punitive damages are designed to deter certain conduct rather than to compensate the plaintiff, such damages should be available without regard to whether the economic damages are limited by the possibility of a late, hypothetical discharge.

Since there seem to be no difficult questions concerning the availability of relief of these kinds, we do not address these matters further in the textual discussion that follows.

1. *Economic Damages*: It facilitates analysis to consider how similar problems are treated as a matter of the law of torts. *See Price Waterhouse*, 490 U.S. at 264 (characterizing Title VII as a "statutory employment 'tort' "). The general tort rule is that, once the plaintiff has satisfied her burden of proving that the defendant's wrongful conduct was the cause of some damage, the calculation of the amount, where uncertain, "may be left to reasonable inference," Charles T. McCormick, *Handbook of the Law of Damages* § 27, at p. 101 (1935), and "[t]he wrongdoer is not entitled to complain." *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931); *Eastman Kodak Co. v. Southern Photo Material Co.*, 373 U.S. 359, 377-79 (1927); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946).

Assuming an omniscient trier of fact and a deterministic universe, deciding whether contingent events would have happened in the absence of the defendant's wrongful conduct in determining the plaintiff's damages makes perfect sense. However, in the real world of affairs the law has long had to cope with the fact that, regardless of what theory is accepted with regard to determinism, omniscience is not possible, and the contingent possibilities that might affect damages are infinite. In determining damages, therefore, courts have consistently excluded consideration of possible developments that are too remote, speculative,

and uncertain, and have done so most forcefully when it is the defendant, *an adjudicated wrongdoer,* who is seeking to rely on such possibilities to limit monetary relief.[16]

For example, there is considerable discussion by commentators concerning hypotheticals in which a person is shot while (1) standing in the path of an avalanche and (2) about to embark on a steamship doomed later to strike an iceberg and sink. Although the commentators differ in their reasoning, they agree that the fact of the avalanche, already in progress when the shooting occurred, should be considered in determining damages for wrongful death, while the planned embarkation on the steamship should not. *See, e.g.* Prosser, *Handbook of the Law of Torts, supra,* § 52, at pp. 321-323; King, Causation, Valuation and Chance, *supra,* 90 Yale L.J. at 1358; Robert L. Peaslee, Multiple Causation and Damage, 47 Harv. L. Rev. 1127, 1139-40 (1934). According to Prosser, for contingent factors properly to be considered in reducing the amount of damages, "they must be in operation when the defendant causes harm, and so imminent that reasonable men would take them into account." Prosser, *Handbook of the Law of Torts* at p. 321. The plaintiff with a steamship ticket might later decide not to make the voyage, might somehow spot the iceberg in time to avert an accident, or might miraculously be the sole survivor of the wreck. All that being possible, at some point the law must disregard contingent events in computing damages, because "[t]he retrospective conjuring up of events contingent at the time of injury would open

[16] We recognize that *Price Waterhouse* did sanction the proof of facts concerning what would have happened absent a discriminatory motive as an affirmative employer defense, itself a somewhat speculative endeavor (albeit much less speculative than the hypothesis ventured here, since the pertinent discharge itself and the mixed motives therefore were real, not hypothetical). The plurality opinion in *Price Waterhouse,* however, specifically recognized that where the question is "the proper determination of relief rather than [as in *Price Waterhouse*] the initial finding of liability, different principles may govern." 490 U.S. at 254.

the door to absurd results" and "allowing such factors to affect valuation would create a rule that could not be administered." King, Causation, Valuation and Chance, 90 Yale L.J. at 1358.

2. There may be some employment discrimination cases that are similar to the "avalanche" hypothetical, in that a later, valid termination is already "in progress" at the time of the earlier, illegal termination, and should properly be taken into account in valuing economic damages. For example, where there are discrete layers of management with discharge and layoff authority, it is possible to imagine a situation in which an individual is illegally discharged on a Monday although, unbeknownst to her or to the supervisor firing her, headquarters has already determined to discharge her for a legitimate reason recently discovered, and has placed the pink slip in her envelope, awaiting delivery at the end of the week. While, even in this circumstance, termination on Friday is not certain—perhaps the employer will have a change of heart or of need, due to the employer's landing a major contract on Wednesday—the contingency is sufficiently certain that economic damages for the illegal discharge should be limited to backpay for the period between Monday and Friday.[17]

In terms of certainty, the present case is at the other end of the spectrum.

[17] As we discuss later, the propriety of relying on such a contingent, although extremely likely, event to limit damages should properly depend in part upon the clarity of the showing that the contingent event was indeed in progress. In the hypothetical in the text, that showing can normally be made through evidence that a decision had been made to discharge the plaintiff and would have been carried out other than the testimony of headquarters personnel as to their subjective intent. For example, the pink slip should be available, and testimony as to when the envelopes were stuffed should be as well. If there were *no* documents or external events to confirm the "decision" to discharge the plaintiff imminently, the contingent nature of the event testified to, compounded by the speculative nature of the testimony, counsels against permitting any discount of damages on that testimony.

(a) First, the questions of whether the employee infraction would have been discovered by the employer, and if so when, involve many contingent circumstances.

(i) It might be supposed that these two questions can be answered in a nonspeculative manner by proof as to whether and when the information was in fact discovered. But where the information came to light in the course of litigation, that fact does not provide the answer to the *pertinent* question, which is what would have happened had the plaintiff employee's employment simply continued, without any unlawful discharge. *See Albemarle Paper Co.*, 422 U.S. at 418-19 ("The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed") (quoting *Wicker v. Hoppock*, 6 Wall. 94, 99, 18 L.Ed. 752 (1877)). Since, absent the earlier, illegal discharge there is no reason to believe there would have been any lawsuit at all, there is no logical basis for the proposition that the information obtained in the course of that lawsuit is information that the defendant employer would have obtained *absent the lawsuit*.

Permitting employers who are defendants in lawsuits brought to enforce anti-discrimination statutes to use information about employment matters, *dehors* the merits, that is brought to light through the litigation process to limit their damages for committing a statutory wrong would, moreover, undermine the efficacy of the overall statutory system designed to prevent the commission of such wrongs.

If an employer had a policy of investigating wrongdoing more vigorously for women than for men, for blacks than for whites, or for older workers than for younger workers, and discharging those found in such investigations to have committed wrongs presenting grounds for discharge, that practice in itself would be discrimination based on a proscribed criteria, and illegal. *Cf. McDonald, supra.* Similarly, an employer who automatically ran a background check on any employee who filed a complaint of age discrimination with the EEOC but not

on any other present employees and took action based on the information obtained could well be held to have "discriminate[d] against any individual . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge . . . under this chapter." 29 U.S.C. § 623(d). *See Francis v. AT&T*, 55 F.R.D. 202 (D.D.C. 1972). The effect of permitting employers to use information obtained as a result of a discrimination lawsuit to create a hypothetical, earlier discharge as of the time of the litigation discovery of adverse information is precisely the same as sanctioning actual discharges on the basis of discriminatory or retaliatory investigations. Both practices are antithetical to the anti-discrimination goals of the ADEA and should not be permitted.[18]

(ii) At a minimum, then, to limit damages, an employer would have to prove two entirely speculative facts—that absent the lawsuit, the adverse information would have been discovered, and would have been discovered at some particular time.[19] While it is possible to

[18] Questions concerning whether information revealing employee misconduct obtained after discharge is admissible at the liability stage present very different issues, and need not be addressed in this case. For example, there may be circumstances in which resume misrepresentations discovered after discharge are pertinent for impeachment purposes, either to contest some affirmative plaintiff testimony or to demonstrate that the plaintiff has made misrepresentations at other times. Or it is possible that where an employer is trying to prove a neutral, nonpretextual basis for a discharge, evidence that an employee at other times committed acts similar to those for which he or she was discharged might be probative in showing that he or she in fact committed the act for which the discharge was imposed. Ordinary evidentiary principles concerning the balance of probative value against probable prejudicial impact would apply to these circumstances, *see* Fed.R.Evid. 403, which are quite different from those discussed in the text.

[19] We note that even where there are objective facts sufficient to indicate that the information would have come to light eventually, concrete information concerning when that information would have been discovered is likely to be more difficult to come by.

There may be circumstances, of course, in which the information in question was *in fact* uncovered after the discharge but inde-

imagine circumstances in which these facts could be proven to a fair degree of certainty (although probably to a lesser degree of certainty than the "doomed steamship" example considered too speculative in the tort context), those circumstances are likely to be rare.[20]

(b) Second, there are the entirely speculative questions whether or not the employer, having obtained the adverse information, would have in fact discharged the plaintiff; if so, whether that discharge would have been legitimate rather than discriminatory or retaliatory; and if so, when the discharge would have occurred.

These complex, interrelated questions cannot be answered simply by showing that the employee in fact committed an infraction of an established rule, even a serious one. As *McDonald, supra,* and *McDonnell Douglas, supra,* indicate, employers do not always take adverse action even against serious wrongdoers. There are often a myriad of competing considerations, particularly where the issue is discharge, including: an employee's special, irreplaceable skills; the state of the market for similar employees; the length of an employee's employment and his previous employment record; any mitigating circumstances that explain the rule violation; whether

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pendently of the lawsuit and free of any discriminatory intent. For example, an employer might be able to demonstrate that sometime after a plaintiff was discharged but before the discrimination charge or lawsuit was filed, the employer did a general audit in the ordinary course of business which uncovered the plaintiff's record keeping errors. Such a showing would eliminate the question of discovery of the adverse information as a speculative one, but would leave hypothetical the question whether or not the individual would have been fired as a result of that information and, if so, when.

[20] For example, in the situation posited in the previous footnote, it is possible that a regularly-scheduled audit, conducted in the same way each year and in a way that almost certainly would discover recordkeeping errors, would suffice to demonstrate that discovery would have occurred even if the audit that turned up the error took place *after* the employer learned of the recordkeeping error through discovery in the lawsuit.

the employee has taken concrete steps to correct the circumstances that gave rise to the violation, such as undergoing treatment for alcoholism after driving while drunk; the likely impact of discharging a particular individual or individuals upon the morale of the workplace or the performance of other employees; whether the rule infraction actually caused any concrete harm to the employer; and intangible considerations such as the friendship between the employee and his or her superiors, or between the employee and other individuals or firms upon whom the employer is economically dependent.

Personnel directors and other managerial personnel responsible for discipline of employees take just such considerations into account, as the literature concerning the complex calculations that go into discharge decisions attest. *See, e.g.,* Buckman, *To Fire or Not to Fire,* in Stone, ed., *The American Management Association Handbook of Supervisory Management* (1989). Arbitrators too take these considerations into account in determining whether or not a particular discharge was for "just cause", and regularly reinstate individuals as having been discharged without "just cause" where, for example, the infraction, albeit a fairly serious one, was an isolated event in a long, favorable employment record. Frank Elkouri & Edna Elkouri, *How Arbitration Works* 670-88 (4th ed. 1985); *see also id.* at 692 ("in the vast majority of cases there is no . . . 'automatic' basis for discharge; . . . all factors relevant to industrial discipline may be considered by the arbitrator in determining whether the employee deserved discharge, some lesser penalty, or no penalty at all—each case is thus decided on the basis of its own facts and circumstances.")

Recreating the balancing of competing factors that the employer would have arrived at absent the discriminatory discharge would seem unduly speculative in almost all circumstances.[21]

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[21] Again, it is possible to imagine very limited circumstances in which such proof would rise to a fair level of certainty. An

2. *Proof of Economic Damages*: Assuming that the defendant employer, although found to have violated the ADEA, were permitted to reduce Ms. McKennon's economic damages award by proving such contingent facts, the adequacy of the evidence proffered by the employer to prove those facts would have to be analyzed in the context of settled principles regarding the proof of compensatory damages, and of the equally settled principles regarding competent evidence.

The first of the proof of damages principles is that, where the fact of an injury can be proven, the plaintiff is entitled to recovery even if contingencies prevent the amount of damages from being ascertained with certainty. "[T]here is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount." *Story Parchment Co.*, 282 U.S. at 562; Charles T. McCormick, *Handbook of the Law of Damages* §§ 26-27 (1935). While "damages must be susceptible of ascertainment in some manner other than by mere speculation, conjecture or surmise," (22 Am. Jur. 2d, *Damages* § 489 (1988)), it is enough "if the evidence shows the extent of the damages as a result of just and reasonable inference." *Story Parchment*, 282 U.S. at 563. So, for example, as a general matter the fact that there is some possibility that an employee might have ceased to be employed does *not* limit the assessment of damages for wrongful termination:

> Plaintiff might become ill, or his employer might terminate his employment for some reason or the plant in which the plaintiff is working might be destroyed. Yet the law permits recovery for wages lost

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employer might be able to demonstrate with objective evidence of past practice that its approach is not in fact to balance competing considerations with regard to one or more particular, explicitly forbidden infractions, but to apply an unalterable policy with regard to any employee found to have engaged in that conduct. (Again, however, even such proof would not survive the "doomed steamship" analysis).

> as a result of injury despite the possibility of the happenings stated. [*Nager v. Nager*, 339 S.W.2d 492, 498 (Mo. Ct. App. 1960).]

See also, Story Parchment, 282 U.S. at 563 ("Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured party, and thereby relieve the wrongdoer from making any amend for his acts.")

The second of these proof of damages principles is that, while damages need not be certain to be recovered, neither can they be based on "mere speculation or guess." *Story Parchment*, 282 U.S. at 563; *Palmer v. Connecticut Ry. & Lighting Co.*, 311 U.S. 544, 559 (1941) ("an estimate [must] be made upon judgment and not guesswork."); Charles McCormick, *Handbook of the Law of Damages* § 26 ("the jury must have factual data—something more than guesswork—to guide them in fixing the award"). This rule applies both to contingencies sought to be introduced to enhance the damage award and contingencies sought to be introduced to reduce the award. *See, e.g., Noble v. Tweedy*, 203 P.2d 778, 782 (Cal. Ct. App. 1949):

> The possibilities of a breach by plaintiffs, or insolvency, or of a destruction of the building, are wholly speculative and fanciful. It is clear that damages could not be *granted* upon the basis of anticipated future injuries or other events as purely hypothetical as these; and it follows that by way of analogy, that they likewise do not constitute a basis for *denying* a recovery for damages which are otherwise reasonably certain to be sustained. [Emphasis in original.]

See also Proulx v. Citibank, N.A., 681 F. Supp. 199, 202 (S.D.N.Y. 1988) (refusing to award damages based on conjecture that employee would have been fired at a later date because "neither an award of damages, nor denial of them may be based on speculation." (citation omitted) *aff'd mem.* 862 F.2d 301 (2d Cir. 1988)).

The third proof of damages principle is that, where it is the defendant's wrong that prevents a precise calculation of damages, the risk of this uncertainty must be borne by the defendant. "The most elementary considerations of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 256 (1946); *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 687-88 (7946); *see* McCormick, *Handbook of the Law of Damages* § 27.

Thus, in evaluating any evidence concerning whether the wrongfully terminated employee might have been discharged at some later date, the law of damages makes clear that (i) the possibility of such a contingency does not prevent damages from being awarded; (ii) such a contingency is not properly considered in calculating a damages award if the proffered evidence permits only substantial speculation or guesswork as to whether the contingency might occur; and (iii) if the contingent event cannot be proven with the requisite certainty because the employee was first wrongfully terminated, that is a risk the wrongdoer must bear.

Added to these considerations must be the general principle, encompassed in Fed. R. Evid. §§ 602 & 701, that, since admissible testimony must be based on personal knowledge, non-expert testimony premised on speculation or conjecture (including answers to questions about "what if" something had happened) is generally *inadmissible entirely.* 27 Charles A. Wright & Victor J. Gold, *Federal Practice & Procedure,* § 6026, at p. 231 (1990); Graham, *Handbook of Federal Evidence* § 611.18, at pp. 545-56 (1986); Joseph M. McLaughlin, *Federal Evidence Practice Guide* § 16.17[2] (1994). On this basis, courts routinely hold that "a witness may not testify to what he would have done had the situation been different from what it actually was." *Elyria-Lorain Broadcasting Co. v. Lorain Journal Co.,* 298 F.2d 356, 360 (6th Cir. 1961); *see also Evanston Bank v. Brink's Inc.,* 853 F.2d 512, 515 (7th Cir. 1988) (objection to "question [as to]

. . . what the bank would have done under given circumstances" properly sustained because "this question would have required [the witness] to speculate about what might have happened"); *Roberts v. Sears, Roebuck & Co.,* 531 F. Supp. 784, 788 n.5 (N.D. Ill. 1982).

Taking these various considerations together and applying them to the present circumstances, it is apparent, first, that an employer's *bare testimony,* whether on the stand or by declaration, that an ADEA plaintiff would have been discharged other than when she actually was, and would have been discharged for a legitimate, nondiscriminatory reason, is simply inadmissible as conjectural, and therefore insufficient to sustain the employer's burden on the damages issues in the case.[22]

Second, any objective evidence offered to prove the hypothetical discharge must be sufficient to enable the fact of such discharge to be found without substantial speculation or conjecture. Thus, for example, proof of the existence of a firm rule proscribing certain conduct or of the seriousness of the offense, standing alone, will usually be insufficient, given the complex factors that usually go into discharge decisions, absent proof that the offense is one that in the past has uniformly led to discharge once discovered. If such proof is unavailable because the employer has not in the past dealt with a similar situation

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[22] On this basis alone, the judgment below should be reversed.

We note as well that even if such opinion testimony by parties to the litigation *were* admissible, when submitted in declaration form, on summary judgment, it is inadequate standing alone to meet the employer's affirmative burden of proof because " 'the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact.' " *Sartor v. Arkansas Natural Gas Co.,* 321 U.S. 620, 628 (1944); *compare Anderson v. Liberty Lobby,* 477 U.S. 242, 256 (1986) (holding that it is not enough to defeat summary judgment concerning an issue of actual fact (rather than opinion or conjecture) that the fact concerns a state of mind and the testimony could be disbelieved, but not overruling *Sartor* or addressing the question whether the rule is the same for opinion testimony or for interested witnesses).

then, ordinarily, it would be speculative whether or not a lawful and proper discharge would have occurred.

In that event, the employer, as the adjudicated wrongdoer and the party that by initially discharging the plaintiff unlawfully precluded the possibility of ascertaining whether the legal discharge would have actually occurred must bear the consequences of his wrongdoing—*viz.*, that it became impossible to prove what might have happened without undue speculation. The employee would then be entitled to full backpay relief to the date of judgment, since the employee, as the party who does not bear the risk of uncertainties in the calculation of damages, is entitled to the normal presumption that her employment would continue.

3. *Reinstatement*: In determining the availability of reinstatement relief, the primary governing criteria, once again, must be the twin goals of employment discrimination laws, eliminating discrimination generally and "making whole" the individual discriminatee. *Albemarle Paper Co.*, 422 U.S. at 405. And, those criteria, once again, lead at the very least to the conclusion that usually an ADEA plaintiff who proves she was discharged for discriminatory reasons should be reinstated unless the employer can demonstrate, on the basis of competent evidence, that absent the discriminatory actions, the employer would have discovered that the employee committed a dischargeable offense, and the employer would, in fact, on that lawful basis, have discharged the employee.[23]

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[23] Reinstatement, unlike ADEA damages, is an equitable remedy, and a remedy not covered by the well-developed principles concerning the determination of damages discussed above. For both reasons, it is possible that the level of proof with which the employer must establish the hypothetical facts that could limit the ordinary reinstatement remedy may be lower than is the case for damages. Even so, the kind of evidence relied upon in this case—bare statements by employer agents as to what would have happened—would clearly be insufficient, because inadmissible for any purpose as purely speculative. *See* p. 26, *supra*.

There are, however, circumstances in which this usual rule should be modified, sometimes to the effect of denying reinstatement that would be mandated by the "make whole" approach, and sometimes to the effect of requiring reinstatement even where the employer could show that the individual would not have been retained.

In the first category is the hypothetical circumstance, cited often in the court of appeals "after-acquired" evidence cases (*see, e.g., Summers v. State Farm Mutual Automobile Ins. Co.*, 864 F.2d 700, 708 (10th Cir. 1988)), in which the individual in question held his or her job *illegally*, because of lack of a required license (the masquerading doctor example of *Summers*), failure to reach the requisite legal age requirement, or failure to meet some other explicit requirement set, not by the employer, but by the *government*. Under those circumstances, where reinstatement would violate clearly established public policy embodied in positive law, a court of equity should deny reinstatement, without more. *Cf. United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42, 45 n.12 (1987).

On the other hand, an order of reinstatement is a form of injunctive relief, and "[t]he injunctive remedy for a proven violation of law will often include commands that the law does not impose on the community at large." *Teachers v. Hudson*, 475 U.S. 292, 309-310, n.22 (1986). There may well be instances in which the employer's discriminatory acts will be blatant, while the employee's infractions, although constituting a dischargeable offense under the employer's standards, are not as an objective matter egregious. Under those circumstances, if the discriminatee is not returned to the workplace, the lesson conveyed to both the discriminatee and to other employees of the employer would be that acts of serious discrimination will not be fully redressed. In such circumstances, the employer's *usual* managerial prerogatives, exercised through nondiscriminatory application of workplace rules, should not alone supply a basis for refusing reinstatement relief.

The National Labor Relations Board takes essentially this approach in determining whether to order reinstatement of employees who were discriminated against but have committed dischargeable offenses for which the employer would have fired them:

> "While seeking to be excused from his obligation to reinstate or pay backpay because of misconduct which was not a factor in the discriminatory action, an employer has a heavier burden than when he is merely seeking to justify the original discrimination. In the former case, he has the burden of proving misconduct so flagrant as to render the employee unfit for further service, or a threat to the efficiency of the plant." [*Owens Illinois*, 290 NLRB 1193 (1988), *enforced without opinion*, 872 F.2d 413 (3rd Cir. 1989), *quoting Mandarin*, 228 NLRB 930, 931-32 (1977).]

We would suggest that the considerations with regard to reinstatement under the ADEA are the same, and that the same principles should govern.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed, and this case should be remanded for further appropriate proceedings on the plaintiff's complaint.

Respectfully submitted,

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